Supreme Court, U.S.
FILED
JUN 24 1996
CLERK

No. 95-1902

In The

Supreme Court of the United States

October Term, 1995

THE UPJOHN COMPANY,

Petitioner,

vs.

BEVERLY SCOVISH, Administratrix of the Estate of WALTER SCOVISH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Connecticut state court's pre-trial discovery order, which compelled the production of the ordinary work product portions of a computer database, which organized over one million (1,000,000) documents relating to the pharmaceutical product at issue in the case, violate the petitioner's Fifth Amendment rights so as to amount to an unconstitutional "taking of property"?

PARTIES TO THE PROCEEDINGS BELOW

The respondent is the plaintiff in an underlying action as an individual as well as in her capacity as the Adminstratrix of her late husband's estate. The defendants in this action are the petitioner and Eric N. Thompson, M.D.

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The respondent, Beverly Scovish, respectfully requests that this Court deny the Petition for a Writ of Certiorari. The petition seeks review of the Connecticut Supreme Court's finding that the intermediate appellate court did not abuse its discretion in determining that a trial court's pre-trial discovery order was not a final judgment. The appellate court's determination compelled the dismissal of the petitioner's state court appeal.

STATEMENT OF JURISDICTION

To create jurisdiction under 28 U.S.C. § 1257, an asserted federal question must have been considered and decided by the applicable state court. *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). The respondent submits that the constitutional issue raised by this petition was never considered or decided by a Connecticut state court.

Moreover, an asserted federal question must be "substantial" and not so "absolutely devoid of merit as to be frivolous." *Equitable Life Assur. Soc'y v. Brown*, 187 U.S. 308, 311 (1902). The petition in the instant case fails to meet even this minimal threshold; the underlying decision, a trial court, pre-trial discovery order compelling the disclosure of material arguably protected by the "work product" doctrine, does not create a substantial federal question which merits this Court's review.

STATEMENT OF THE CASE

The petitioner seeks review of a discovery order, issued by the Connecticut Superior Court (trial court) on November 22, 1995. The discovery order which gives rise to this petition issued after two separate lengthy oral arguments, two rounds of briefing and a thorough review of the applicable Connecticut law by the trial court. Since that time, the petitioner has sought to avoid

complying with this ruling by appealing this interlocutory order. The petitioner followed that course despite the fact that discovery orders, even those which compel the disclosure of arguably privileged material, are not final judgments under Connecticut law. *Melia v. Hartford Fire Ins. Co.*, 202 Conn. 252, 521 A.2d 605 (1987). This case arises out of the wrongful death of the respondent's decedent, Walter Scovish. Mr. Scovish's death was allegedly caused by side effects of the petitioner's prescription sleep medication, Halcion. Halcion has had an extremely controversial history, including having been the subject of a recent report by the United States Food and Drug Administration. This report was issued by a special task force and came to a number of conclusions, including that,

> . . . further inquiry into allegations of criminal misconduct by Upjohn is most appropriately the subject of consideration by the Department of Justice, which has additional investigative authority (e.g., subpoena power) and Federal prosecutorial responsibility.

Report of the Halcion Task Force U.S. Food and Drug Administration, at page 29. In addition to this recent FDA action, a number of other countries have banned the sale of Halcion, including Great Britain.

As would be expected in a complex, pharmaceutical product liability action, discovery has been bitterly resisted and aggressively fought by this petitioner. The respondent has consistently sought ways to streamline discovery, as the relevant documents would total over one (1) *million* pages. However, one common technique for streamlining discovery was not available to the respondent in the action. The respondent was prohibited from sharing many documents with other similarly situated

plaintiff's counsel. Over one hundred other Halcion cases have been filed nationwide and in all but one other case, Upjohn has obtained "blanket" protective orders. These protective orders severely restrict the ability of plaintiffs to pool resources and share the expense relating to document production.

As respondent's counsel knew about these protective orders from the outset of this matter, a discovery request was submitted to Upjohn for computer databases. The respondent's request was intended to facilitate the transfer of documents and to minimize the respondent's search for damaging "needles" in Upjohn's Halcion "haystack." Upjohn objected to this request, which was filed on August 23, 1993. Despite its objection, over the next two (2) years Upjohn provided information regarding the existence of various computerized databases in response to repeated inquiries by respondent's counsel. Finally, Upjohn admitted to having a comprehensive database regarding Halcion related documents.

This comprehensive database involves a massive number of documents. As the trial court observed,

> [b]y defendant's own admission, "a print-out of database information for all documents that have collected would number more than one hundred thousand pages." (Defendant's exhibit 5, Affidavit of Vivian W. McLeod, Esq. ¶ 8)

Petitioners Appendix ("P.A.") 8a. The underlying documents would many additional pages, as, "[t]he development, testing, manufacture and governmental review of this drug . . . produced hundreds of thousands of documents that the plaintiff has the right to review." *Id.* The trial court recognized the need to streamline discovery, and therefore, ordered that Upjohn

provide the respondent with a copy of this comprehensive database redacting those portions which would constitute "opinion" work product.

This order entered after two (2) separate oral arguments and extensive briefing, which included detailed affidavits by the petitioner regarding the nature of this database. The trial court's decision was based upon a factual finding that the respondent had a substantial need for the database which outweighed any work product privilege. P.A. at 9a. Upjohn appealed that decision and on March 20, 1996 the Appellate Court granted the respondent's Motion to Dismiss, agreeing that the trial court's order was interlocutory. On May 9, 1996, the Connecticut Supreme Court denied certification and in doing so refused to review the propriety of the Appellate Court's decision.

REASONS FOR DENYING THE WRIT

I.

THE PURPORTED FEDERAL QUESTION RAISED BY THE PETITION WAS NOT CONSIDERED OR DECIDED BY A STATE COURT.

In this petition, Upjohn asserts that the order at issue deprives it of property without just compensation in violation of the Fifth Amendment and seeks review pursuant to 28 U.S.C. § 1257. However, in order for this issue to be properly before this Court, Upjohn must have presented the issue for determination by a state Court. *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 313, fn. 8 (1987); (citing *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1912)). In this regard, the petition is lacking.

While the petitioner claims to have raised this issue in the

Connecticut Courts, that assertion misstates the record. Petition ("Pet.") at 6-7. As demonstrated below, the petitioner failed to present and preserve any federal issue for review in the Connecticut court system.

The discovery order at issue followed the respondent's Motion to Compel filed in the trial court. *No where* in the extensive materials submitted in opposition to this Motion did the petitioner raise a federal question, much less one of constitutional magnitude. Moreover, the petitioner failed to raise any federal questions in any of its submissions to the appellate courts in the State of Connecticut. This omission occurred at the Connecticut appellate court in the petitioner's Preliminary Statement of Issues and in its Memorandum of Law in Opposition to Appellee's Motion to Dismiss Appeal and Request for Hearing. Likewise, the petition failed to raise the Fifth Amendment issue in its Petition for Certification to the Connecticut Supreme Court.

The petitioner referred to the Fifth Amendment on only one occasion in the entire Connecticut court system. After the trial court granted the respondent's Motion to Compel, the petitioner filed a Motion to Reargue Plaintiff's Motion to Compel. Therein, Upjohn presented the identical arguments that it offered in response to the respondent's initial Motion: (1) the database constituted work product; and (2) that the respondent had failed to demonstrate a substantial need for the disclosure of the database. As those issues had been fully argued and briefed previously, the Court summarily denied this Motion to Reargue. P.A. at 11a.

In addition to these arguments, the petitioner added the following footnote, which could only be described as an aside:

> The Court's ruling ***may*** also constitute a "taking" of private property for public use

> without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Art. I, § 11 of the Connecticut Constitution. Although the Court has not prohibited Upjohn from using its own database, the Supreme Court has noted: "Government action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984). Here, the Court's ruling will have tremendous and unfair economic impact. It would undermine "all or most" of the value of the Halcion database by giving plaintiff an important tool created and used by Upjohn's attorneys to advise and defend Upjohn in litigation. (Emphasis added).

Defendant The Upjohn Company's Motion to Reargue Plaintiff's Motion to Compel, dated December 12, 1995 at page 5, fn. 2. The manner in which this footnote merely mentions a potential issue in a Motion for Reargument indicates that this issue was not "considered and decided" by a Connecticut court.

The footnote cited above did no more than allude to a possible constitutional issue. Pursuant to Connecticut law, "[w]here an issue is merely mentioned but not briefed beyond bare assertion of the claim, it has deemed to have been waived." *Bridgeport Hospital v. Comm. On Human Rights & Opp.*, 232 Conn. 91, 653 A.2d 782 (1995); (citing, *Hayes v Smith*, 194 Conn. 52, 66, n.12, 480 A.2d 425 (1984)). By utilizing the word "may" in the above footnote and failing to develop the legal argument beyond a mere assertion, Upjohn waived the constitutional issue at the trial court. Therefore, no Connecticut

state court considered or decided the federal Constitutional question, consequently depriving this Court of jurisdiction. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 484 (1983).

Moreover, even if one were to assume, *arguendo*, that Upjohn presented the takings issue to the trial court, the issue was subsequently abandoned. The petitioner failed to raise the issue at the Connecticut appellate court in its Preliminary Statement of Issues. This failure continued when the petitioner failed to raise a federal question in it's brief in opposition to the respondent's Motion to Dismiss. Finally, the petitioner failed to raise any federal question in its Petition for Certification to the Connecticut Supreme Court. These failures would again demonstrate that this Court lacks jurisdiction pursuant to 28 U.S.C. § 1257. *Id.*

II.

THE PETITIONER SEEKS REVIEW OF CONNECTICUT STATE COURT'S INTERPRETATION OF A STATE PROCEDURAL RULE, WHICH PERMITS THE DISCLOSURE OF "WORK PRODUCT" AFTER A FACTUAL FINDING OF SUBSTANTIAL NEED.

While the petitioner has attempted to invent a constitutional issue,[1] it seeks review of an order which can be simply described as follows: the trial court found that under the facts of this case, and the procedural rules of the State of Connecticut, the respondent was entitled to obtain "ordinary"[2] work product from the petitioner.

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1. As indicated above, this constitutional issue was "invented" at this stage of the proceedings, as it had not been previously asserted.

2. The trial court below distinguished between "ordinary" work

(Cont'd)

The trial court issued the discovery order at issue after making a specific factual finding which is required under Connecticut law. Pursuant to § 219 of the Connecticut Rules of Court, a party may obtain materials prepared by an opposing party, or its representative,

> . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Id. The trial court specifically found that the plaintiff had made the requisite showing when it ordered the disclosure of the petitioner's database. P.A. at 8a-10a. This determination is solely an issue of Connecticut law, independent of any federal question, and therefore, this Court lacks jurisdiction over the petition. *Michigan v. Long*, 463 U.S. 1032, 1037-38 (1983). As the petition merely takes issue with the trial court's factual finding, a finding premised upon a "properly stated rule of law", this Court should not accept certiorari. Supreme Court Rule 10.

However, even if one were to assume that a properly preserved federal question existed, the petitioner fails to demonstrate that its rights were violated.

A. The trial court's decision correctly applied the work product doctrine.

The petitioner has failed to put forth any rationale which

(Cont'd)
product, which may be discovered under certain circumstances (P.A. at 6a) with "opinion" work product, which contains legal strategy and is ordinarily not discoverable. *Id.*

would support its contention that the trial court misapplied the work product doctrine. As this Court has observed,

> [w]e do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases.

Hickman v. Taylor, 329 U.S. 495, 511 (1947). As this quote illustrates, trial courts have long possessed the discretion to balance competing interests and order the disclosure of work product materials in an appropriate case.

As to the specific disclosure at issue, a computerized database, the only other court to address this issue has likewise ordered the production of a party's database. *See The State of Minnesota, et al. v. Philip Morris, Incorporated, et al.*, Court File No. C1-94-8565 (Dist. Ct., State of Minn.); United States Supreme Court No. 95-1611, *cert. denied*, May 28, 1996. Therefore, unsurprisingly, the petitioner has failed to cite to any authority which holds ordering the disclosure of a litigation database to be improper.

B. The petitioner has failed to demonstrate that the discovery order at issue implicates the takings clause.

The petitioner has failed to cite to any authority which supports the proposition that a pre-trial, discovery order can implicate the takings clause. Moreover, the one case that the petitioner principally relies upon, *Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984), is readily distinguishable.

Pursuant to *Ruckelshaus*, the petitioner must make a threshold showing that any property interest which they possess

in this database arises, "from an independent source, such as state law. . . ." *Ruckelshaus*, 467 U.S. at 1002-1004. The petitioner has failed to meet even this initial burden.

However, even if one were to assume that the petitioner can identify a property interest in the computer database, the takings clause would still not be implicated. The petitioners must show (1) an economic impact and (2) an investment-backed expectation that the information from database would not be discoverable. *Ruckelshaus*, 467 U.S. at 1005-06. The petitioner can demonstrate neither .

As to the economic impact, the petitioner could not sell the database, which distinguishes the asset at issue with the "trade secrets" which were the subject in *Ruckelshaus*. *See* Gregory Gelfand, *"Taking" Informational Property Through Discovery*, 66 Wash. U. L.Q. 703, 709 (1988). Moreover, the petitioner has not expressed any fear that its database would be turned over to competitors, *see Ruckelshaus*, 467 U.S. at 1012; rather, it fears that the playing field will be leveled in this litigation.

As to the petitioner's expectations, Upjohn could not, contrary to its claims at pages 12-14 of the petition, claim that it had no expectation its database would be discoverable. The work product doctrine has long been limited in nature, such that all state and federal courts are permitted to order the disclosure of work product under certain circumstances. Given this limitation, Upjohn had to have expected that this database could have been disclosed. These facts compel the conclusion that no takings clause violation has occurred. *Ruckelshaus*, 467 U.S. at 1009-10.

For all of these reasons, lack of a property interest, lack of economic impact and the lack of reasonable expectation of privacy, the petitioner's takings claim lacks merit.

CONCLUSION

The Petition should be denied. Petitioners seek review of a state court discovery ruling by claiming a federal constitutional violation which they failed to present in state court. Furthermore, the state court ruling at issue was legally correct and did not violate the takings clause.

Respectfully submitted,

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